STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2012
v	No. 301906 Wayne Circuit Court
RAYFIELD CLARY, Defendant-Appellant.	LC No. 10-006937-FC

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 23 to 50 years' imprisonment for the assault with intent to commit murder conviction and two years' imprisonment with credit for 172 days served for the felony-firearm conviction. We reverse defendant's convictions and remand for further proceedings.

Defendant and the complainant, Santonyo Brown, were neighborhood acquaintances. According to Brown, he and defendant ran into each other at a corner store on May 31, 2010, and defendant indicated that he had some marijuana. At that time, Brown stated that he did not have any money for the marijuana. Throughout the day, Brown and defendant exchanged a series of phone calls and eventually agreed to meet at a house on Wyoming Street, where Brown's siblings lived, to smoke some marijuana together. Early in the morning on June 1, 2010, Brown walked to the house on Wyoming Street to meet defendant. As Brown knocked on the door, a car drove by and the passenger shot Brown. Brown identified defendant as the shooter. Defendant agreed with most of Brown's testimony but denied shooting Brown. Defendant testified that he was walking to the house that night and arrived after the police had already been called to the shooting. Defendant's first trial was declared a mistrial because of a hung jury. His second jury trial resulted in his convictions.

On appeal, defendant argues that he was denied his due process rights when the prosecutor made repeated references to defendant's post-arrest silence and failure to testify at his first trial. We agree.

Whether a defendant's due process rights under the Fourteenth Amendment were violated is a constitutional issue that is reviewed de novo. *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009). If an error occurred, then this Court "must determine whether the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The United States Constitution guarantees that no person shall be compelled in any criminal case to be a witness against himself. *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009), citing US Const Am V.[1] Pursuant to *Miranda v Arizona*, 384 US 436, 444-445; 86 S Ct 1602; 16 L Ed 2d 694 (1966), every person subject to interrogation while in police custody must be warned that the person may choose to remain silent in response to police questioning, and, if that person chooses to remain silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person, *Shafier*, 483 Mich at 212, citing *Wainwright v Greenfield*, 474 US 284, 290-291; 106 S Ct 634; 88 L Ed 2d 623 (1986). More specifically, the United States Supreme Court has held that a prosecutor cannot impeach an exculpatory story by cross-examining the defendant about his failure to have told the exculpatory story to the police after being arrested and receiving *Miranda* warnings. *Doyle v Ohio*, 426 US 610, 611; 96 S Ct 2240; 49 L Ed 2d 91 (1976). In concluding that post-arrest, post-*Miranda* silence cannot be used as impeachment evidence, the Michigan Supreme Court has explained:

> The *Doyle* Court reasoned that 'it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.' *Id*. at 618. Further,
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> > it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. [*Id*. at 619 (citation and quotation marks omitted).]
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> And, relying on its earlier decision in *United States v Hale*, 422 US 171; 95 S Ct 2133; 45 L Ed 2d 99 (1975), the *Doyle* Court noted that 'every post-arrest silence is insolubly ambiguous . . . .' *Doyle*, 426 US at 617. It is unclear whether it is merely evidence of the defendant's legitimate invocation of his right against compelled self-incrimination or evidence that he is fabricating his defense theory at trial. Therefore, '[a]fter an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.' *Id*. at 619 n 10. This Court has long approved of these principles, and we were somewhat prescient in our

[1] The Fifth Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Borgne*, 483 Mich at 184.

pre-*Doyle* acceptance of them in *People v Bobo*, 390 Mich 355, 359-361; 212 NW2d 190 (1973).

> Since *Doyle*, the United States Supreme Court has articulated exactly when the general rule from that case applies. It has held that *Doyle*'s rule does not apply-i.e., a defendant's silence may be used to impeach his exculpatory testimony-if the silence occurred either (1) before arrest or (2) after arrest and before *Miranda* warnings were given. See *Fletcher v Weir*, 455 US 603, 605-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 239-240; 100 S Ct 2124; 65 L Ed 2d 86 (1980). This is because, under the United States Constitution, use of a defendant's silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his invocation of that right will not be used against him, which typically only occurs post-arrest and post-*Miranda*. See *Fletcher*, 455 US at 605-607. This Court has also adopted this structure: '"*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."' *People v Cole*, 411 Mich 483, 488; 307 NW2d 687 (1981), quoting *Anderson v Charles*, 447 US 404, 408; 100 S Ct 2180; 65 L Ed 2d 222 (1980). [*Borgne*, 483 Mich at 186-188.]

Accordingly, a prosecutor's references to a defendant's post-arrest, post-*Miranda* silence violate a defendant's due process rights under the Fourteenth Amendment of the United States Constitution. *Shafier*, 483 Mich at 212. However, a prosecutor may reference a defendant's post-arrest, pre-*Miranda* silence. *Borgne*, 483 Mich at 187-188; see also *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005) ("A defendant's constitutional right to remain silent is not violated by the prosecutor's comment on his silence before custodial interrogation and before *Miranda* warnings have been given.").

In this case, defendant's first trial resulted in a hung jury. Before the first trial, defendant filed an alibi notice, but he ultimately withdrew this defense, did not present any witnesses, did not testify, and relied upon misidentification as his defense. At his second trial, defendant chose to testify.[2] During the prosecutor's cross-examination of defendant, the prosecutor impeached defendant by highlighting that, after he was arrested, defendant failed to tell the police where he was when the shooting occurred or that he was innocent:

> *Q.* Okay. Well, if it's the truth, sir, when you were arrested on June 18th, did you go to the police and say, 'Hey, let me tell you, I didn't do it,' did you give them that alibi then, sir?
>
> *A.* After they told me what I was being charged with, I said whatever it is, I didn't do it.

[2] The prosecutor also referred to defendant's failure to proclaim his innocence before he was arrested, but the United States Constitution does not prohibit impeaching a defendant with pre-arrest silence. *Shafier*, 483 Mich 213 n 8.

Q. Okay. Well, then at some point you became aware, sir, of who you were accused of shooting, correct?

A. *Yes, at my arraignment*.

* * *

Q. (By Ms. Towns, continuing.): Now, you said, sir, that you're telling this jury about your alibi now, this is what you're trying to convince this jury of now, correct, sir?

A. I'm not trying to convince, I'm just stating what happened.

Q. But my question to you, sir, is at some point you became aware of who you were accused of shooting, correct?

A. Yes.

Q. And you became aware of the date that they accused you of shooting Mr. Brown, correct, sir?

A. Yes.

Q. So once you knew that date and that person, you then went to the police and told them what you're trying to tell this jury, didn't you, sir?

A. Huh?

Q. Well, as soon as you found out you were accused of shooting Mr. Brown on May 31st, you then went to the police and said, 'Wait a minute, I didn't do that because I was with these other people.' Didn't you tell the police that, sir?

A. Yes, I did.

Q. Well, when did you tell the police that, sir, and who did you speak to?

A. I wasn't interrogated so actually I didn't tell the police that. *Like after I got arraigned*, I — I think I told one of the — one of the — I can't — is it a sergeant — not a sergeant — a detective, a detective asked me did I have anything to say.

Q. And *at that point* did you then tell them this long story about where you were downtown at the Technofest and stopping at the gas station and getting blunts and walking over to the house, did you tell them all that, sir?

A. No, I didn't.

Q. But now you're trying to tell this jury this same story but you didn't think it was important enough to tell the police?

A. I exercised my Fifth Amendment Right.

The prosecutor also referred to defendant's silence during closing argument:

> Well, ladies and gentlemen, if it's the truth, if it's the truth and you're on trial, why wouldn't you tell the first jury? Why wouldn't you tell everybody in the world after you were arrested? In fact, when he was arrested on June 18th, some, what, two weeks after, he doesn't come forward and tell the police. He doesn't contact the Prosecutor's Office. He doesn't come forward to anybody and say, 'Hey, wait a minute, you got the wrong guy and here's why.' He doesn't even tell his other jury. But it's the truth.
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> * * *
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> Now, he keeps saying it's the truth. Well, if it's the truth, it's the truth all day long and it's the truth to the police, it's the truth to the other jury. [Emphasis added.]

After reviewing the record, it is unclear whether the post-arrest silence referenced by the prosecutor was also post-*Miranda* silence. The foregoing testimony reveals that the timeframe focused upon by the prosecutor was post-arraignment, so presumably defendant had been given *Miranda* warnings. However, nothing in the record reveals this one way or the other. This situation is similar to the situation presented in *Fletcher v Weir*, 455 US 603; 102 S Ct 1309; 71 L Ed 2d 490 (1982). In *Fletcher*, the prosecutor referenced the defendant's silence upon being arrested. *Id*. at 603-604. The Court of Appeals for the Sixth Circuit reversed the defendant's conviction, concluding that even though the record did not show that *Miranda* warnings were given immediately upon arrest, the prosecutor's use of post-arrest silence alone for impeachment violated due process. *Id*. at 604. The *Fletcher* Court reversed, noting that "[t]he significant difference between the present case and *Doyle* is that the record does not indicate that respondent Weir received any *Miranda* warning during the period in which he remained silent immediately after his arrest." *Id*. at 605. Accordingly, the Court held:

> In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post[-]arrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave the judge and jury under its own rules of evidence the resolution of the extent to which post[-]arrest silence may be deemed to impeach a criminal defendant's own testimony. [*Fletcher*, 455 US at 607.]

Like in *Fletcher*, the prosecutor's use of defendant's post-arrest silence did not violate due process because, without evidence that defendant received the *Miranda* warnings, defendant did not have a reason to believe that he had the right to remain silent and that his silence would not be used against him. *Fletcher*, 455 US at 607; *Borgne*, 483 Mich at 187-188; see also *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992) ("[A] defendant's exculpatory testimony may be impeached with pre[-]arrest or post[-]arrest, pre-*Miranda* silence, but … a

defendant's silence after arrest and following the giving of the *Miranda* warnings may not be used to impeach an exculpatory story.") (footnote omitted).

However, during cross-examination the prosecutor also impeached defendant by referencing defendant's silence during his first trial:

> *Q.* (By Ms. Towns, continuing): When you went to trial last time sir, isn't it true that you and your lawyers decided to withdraw this alibi notice and not go with this story, isn't that what the decision was made last time you were in trial?
>
> *A.* What story?
>
> *Q.* Well, sir, last time you were in front of a jury you didn't use this alibi, did you, sir?
>
> *A.* I didn't get on the stand.
>
> *Q.* Yeah, but you didn't call any witnesses to – to say that you were somewhere else, did you, sir?
>
> *A.* No.
>
> *Q.* And you decided to withdraw this and not use this last trial, correct, sir?
>
> *A.* Correct.
>
> *Q.* Okay. But now you have a new jury and this is the new strategy this time, right, sir?
>
> *A.* It's not a strategy. It's the truth.
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> * * *
>
> *Q*. But, sir, the last time you were in trial on October 12th and 13th in the same building, remember that, sir?
>
> *A*. Yes, I do.
>
> *Q*. *Okay. You didn't tell that jury the same story you're telling this jury, did you, sir*?
>
> *A*. *I did not get on the stand.*
>
> * * *
>
> *Q*. And, in fact, isn't it true, sir, that now you've had a little strategy change, that now you're going to try to sell the alibi to this jury that you decided you

didn't — you weren't going to sell to the last jury, isn't that what's happening here, sir?

A. I'm not trying to sell nothing. I'm trying to state the truth.

Q. Well, if that was the truth and that was so important, why didn't you tell the last jury?

A. Why didn't I tell the last jury what?

Q. If that was the truth and that was so important, why didn't you tell the last jury?

A. Because I just didn't. I didn't think it would have mattered if I would have got on the stand last time so that's why I didn't get on the stand. [Emphasis added.]

The prosecutor again commented on defendant's silence at his first trial at closing argument:

> Well, ladies and gentlemen, if it's the truth, if it's the truth and you're on trial, why wouldn't you tell the first jury? Why wouldn't you tell everybody in the world after you were arrested? In fact, when he was arrested on June 18th, some, what, two weeks after, he doesn't come forward and tell the police. He doesn't contact the Prosecutor's Office. He doesn't come forward to anybody and say, 'Hey, wait a minute, you got the wrong guy and here's why.' He doesn't even tell his other jury. But it's the truth.
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> * * *
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> Now, he keeps saying it's the truth. Well, if it's the truth, it's the truth all day long and it's the truth to the police, it's the truth to the other jury.

In general, a prosecutor may not comment on a defendant's failure to testify because such comments ask the jury to infer that the defendant was guilty or hiding something because he did not take the stand. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995); *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985). Nevertheless, the prosecutor asserts that *Raffel v US*, 271 US 494; 46 S Ct 566; 70 L Ed 1054 (1926) permitted the aforementioned references to defendant's failure to testify. In *Raffel*, the defendant was tried for conspiracy to violate the National Prohibition Act. At the trial, a prohibition agent testified that after a search of the drinking establishment, the defendant admitted that the establishment belonged to him. The defendant did not testify at the trial, and it resulted in a hung jury. At the second trial, the defendant did testify as did the prohibition officer, who gave the same testimony he gave at the first trial. At the second trial, though the defendant denied making any statement regarding ownership of the drinking establishment to the prohibition officer, he was nevertheless convicted. On appeal, the defendant challenged the propriety of questions posed to him by the prosecution which required him to disclose the fact that he had not testified at the first trial and the reasons why he had not done so. *Id*. at 495-496.

The *Raffel* Court concluded that while the Fifth Amendment prohibited self-incrimination, the immunity it afforded may be waived when the accused chooses to testify. *Raffel*, 271 US at 496. "It is elementary that a witness, who upon direct examination denies making statements relevant to the issue, may be cross-examined with respect to conduct on his part inconsistent with this denial[,]" because "[t]he safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf, and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness." *Id*. at 498-499. Thus, the *Raffel* Court determined that if a defendant does not take the stand during his first trial, but after being granted a new trial, he takes the stand as a witness, the defendant's silence during the first trial may be used during the second trial to impeach inconsistencies. *Id*. at 496-498; see also *Schollaert*, 194 Mich App at 163 ("[W]here the defendant not only offers an exculpatory story, but affirmatively testifies that he had made a post-*Miranda* statement to the police consistent with his trial testimony, the prosecution is permitted to rebut his claim with evidence of the defendant's post[-]warning silence . . . . [A] defendant does not have a constitutional right to immunity from contradiction.").

Unlike the defendant in *Raffel*, defendant in this case did not contradict the testimony of a witness offered at both his first and second trial. Instead, at his second trial, defendant offered an exculpatory story when he testified that he and the victim met at a store and planned on smoking marijuana together, but, the victim was shot by another person before defendant arrived at the house. Accordingly, the *Raffel* rule does not apply and it was error for the prosecutor to refer to defendant's silence during his first trial. Indeed, defendant's offering of an exculpatory story during his second trial is analogous to the situation presented in *Stewart v United States*, 366 US 1; 81 S Ct 941; 6 L Ed 2d 84 (1961).[3] In *Stewart*, after two jury trials during which the defendant remained silent, he chose to take the stand at his third trial. *Id*. at 2-3. At the third trial, the prosecutor cross-examined the defendant regarding his failure to testify at his previous two trials. *Id*. at 3-4. The United States Supreme Court reversed the defendant's conviction, holding that absent the showing of the defendant's silence as inconsistent, it was improper to impeach the defendant with his silence from his first two trials. *Id*. at 4-10. The Court noted that in "no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial." *Id*. at 5. Likewise, in this case, because defendant merely offered an exculpatory story at his second trial and his failure to testify at the first trial was not inconsistent with his exculpatory story, it was error for the prosecutor to impeach defendant with his silence. *Id*. at 4-10; see generally *United States v Rapanos*, 115 F 3d 367, 371 (CA 6, 1997) (a prosecutor cannot comment on a defendant's exercise of his right to remain silent, including a defendant's failure to testify at trial).

[3] We are not certain how the prosecutor can assert that *Stewart* is a federal evidentiary case, as opposed to a constitutional one, when Justice Black commenced *Stewart* with a specific reference to the provisions of the Fifth Amendment. *Stewart*, 366 US at 2.

Once it is determined that a constitutional error occurred, this Court must determine if the error was harmless beyond a reasonable doubt. To do so, the beneficiary of the error must prove, and the court must determine, "beyond a reasonable doubt that there is no 'reasonable possibility that . . . [the error] complained of might have contributed to the conviction.'" *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994), quoting *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967). In this case, because there was no physical evidence, the strength of the prosecutor's overall case against defendant hinged on the jury's assessment of the witnesses' credibility. Although Brown identified defendant as the shooter to his siblings after the shooting, Brown was the only eyewitness to the shooting. As such, the trial was a credibility contest between Brown and defendant and the references to defendant's silence could have undermined defendant's credibility. The prosecution cannot demonstrate that there was no reasonable possibility that the challenged evidence and comments by the prosecutor might have contributed to the conviction.

Defendant also argues that the admission of Brown's bolstering prior consistent statements was reversible error because the lack of any physical evidence rendered the case a credibility contest, and as such, the inadmissible prior consistent statements affected the outcome of the trial. Again, we agree.

During the cross-examination of Brown, defense counsel referenced his preliminary examination testimony and the statement he made to police. Defense counsel's intent with this line of questioning was to cast doubt on the accuracy of Brown's identification of defendant as the shooter. Defense counsel also used Brown's inconsistent statements to show that Brown had originally said that he was going to the house to visit his brother and not to meet defendant. After defense counsel impeached Brown's trial testimony with prior inconsistent statements he made during the preliminary examination and in his written statement to the police, the prosecution read into the record portions of Brown's written statement and testimony from the first trial that was consistent with his trial testimony. At trial and on appeal, defendant argues that this evidence was inadmissible hearsay. Defense counsel objected to the prosecution's line of questioning, but the trial court overruled the objections.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). It is well established that "hearsay" (a statement, other than the one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted) is inadmissible. MRE 801, 802. Moreover, as a general rule, neither party in a criminal trial is permitted to bolster a witness's testimony by seeking admission of a prior consistent statement made by that witness. *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). However, MRE 801(d)(1)(B) provides that some statements, including the prior statement of a witness, are not hearsay if certain criteria are met. A party offering a prior consistent statement must establish four elements:

> '(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the

> time that the supposed motive to falsify arose.' [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), quoting *US v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

In this case, the first element was satisfied because the prosecution introduced the statements during the declarant's testimony. This Court must next determine whether there was "an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony." *Jones*, 240 Mich App at 707. Defense counsel's purpose for highlighting the differences between Brown's preliminary examination testimony and his trial testimony was to question the accuracy of his testimony, specifically his identification of defendant as the shooter. However, mere contradictory testimony cannot give rise to an implied charge of fabrication. *Bao*, 189 F3d at 864. From our review of the record, it does not appear that defense counsel's attacks on Brown's testimony rose to a level of an implied charge of improper influence, motive, or recent fabrication. In fact, both sides had emphasized during Brown's and defendant's testimony that they did not really have any other dealings or a relationship other than the plan to meet on the night of the shooting. Because there was no allegation of improper motive, influence or recent fabrication, the second and fourth element cannot be satisfied. Accordingly, the trial court abused its discretion in allowing the prosecution to introduce this evidence.

However, this Court will only reverse because of an erroneous admission of evidence if, "after an examination of the entire case, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496. Because Brown's and defendant's testimony were almost identical up until the point of the actual shooting, it was more probable than not that the error was outcome determinative. By allowing the prosecution to bolster Brown's identification of defendant as the shooter with prior consistent statements, the erroneous admission of evidence went right to the material aspect of the case. The trial court erred in allowing the evidence and the error was not harmless.

Defendant next argues that the prosecutor committed misconduct by improperly expressing her personal opinion about the justness of her case and defendant's guilt and credibility. Defendant also contends that the prosecutor denigrated defendant by suggesting that he insulted the jury's intelligence by his version of events. We disagree.

When looking at a claim of misconduct by the prosecutor, this Court must examine the relevant part of the record and review a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The appropriateness of a prosecutor's remarks will depend upon the particular facts of each case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Prosecutors may use hard language when the evidence supports it and are not required to phrase arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Further a prosecutor may argue from the facts that the defendant is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Reading the prosecutor's argument in its entirety, it does not appear that the prosecutor was improperly expressing her personal opinion about the justness of her case or denigrating the defense. Rather, the prosecutor was arguing that, based on the evidence and defendant's own

testimony, defendant's denial that he was the shooter was not credible. The prosecutor did not use any evidence that was not adduced at trial, and she was not required to use the blandest terms possible to frame her argument.

Defendant also argues that the prosecutor denigrated defendant and inflamed the jurors' passions and prejudices when she responded to defendant's attempts to discredit Brown's credibility. Defense counsel had argued, in closing argument, that Brown was not able to identify the shooter as defendant because he was legally intoxicated at the time of the shooting and because he had been diagnosed with ADHD and bipolar disorder but did not take his prescribed medications. In response, the prosecutor stated:

> Now I suggest to you, ladies and gentlemen, by attacking the fact that Mr. Brown has ADHD and he's bipolar is almost like blaming a rape victim for wearing a short skirt. Shame on that, shame on that.
>
> To suggest that he doesn't take his medication, maybe he can't afford it, maybe his prescription ran out.
>
> But to suggest that Mr. Brown somehow doesn't know who shot him somehow is incredible, is shameful, shameful. Mr. Brown told everybody in the world who shot him from the minute he was shot, from that moment. Is he mistaken? No. You would have to believe that someone pulled up at the exact moment, the exact location, the exact time, knowing Mr. Brown was there. That's an insult to your intelligence. But instead, let's blame the victim. Let's blame the victim because he was too drunk, he was too high, he's too crazy. Shameful.
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> Illicit drugs, I don't know how long illicit drugs stay in your system. I don't know what kind of medication he received as soon as he rolled into the triage unit. Who knows that? But again, the defense counsel has to suggest he's a drug addict, he's a liar, he's crazy. You know why? Because you have to slime the victim in order for your client to be looked at as not guilty to define some reasonable doubt. Again, nothing supports that but the defendant's own testimony.

The prosecutor's comments must be considered in light of defense counsel's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). A comment that might otherwise be improper may not rise to an error requiring reversal when the prosecutor is responding to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, the prosecutor's comments were properly made in response to defense counsel's arguments. Defendant was not denied a fair trial because of prosecutorial misconduct.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Michael J. Talbot
/s/ Deborah A. Servitto